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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

VAN NIMROD CASTILLO,

Defendant and Appellant.

E063743

(Super.Ct.No. FWV1401675)

OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller,
Judge. Affirmed.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General,
Charles C. Ragland and Alan L. Amann, Deputy Attorneys General, for Plaintiff and
Respondent.

The jury convicted defendant Van Nimrod Castillo of attempted murder (Pen. Code, §§ 187, subd. (a), 664)¹ and assault with a deadly weapon (§ 245, subd. (a)(1)) and found that defendant inflicted great bodily injury during the commission of both offenses (§ 12022.7, subd. (a)). Defendant was sentenced to the upper term of nine years for the attempted murder, plus three years for the infliction of the great bodily injury enhancement, for a total term of 12 years in state prison.

Defendant's sole contention on appeal is that the trial court abused its discretion when it sentenced him to the upper term of nine years for the attempted murder. We disagree.

I

STATEMENT OF FACTS

1. Prosecution Evidence

On May 5, 2014, defendant returned home to his parents' house in Upland after not doing well at medical school in the Philippines. Defendant's older brother was also living at the house.

The day that defendant arrived home, he called the police and told them that he overheard his parents having a discussion in their bedroom about shooting him. The

¹ All further statutory references are to the Penal Code.

police left after determining that the parents did not have a gun and that the house was safe. Defendant's parents told him that they wanted him to call a "treatment facility."²

On the evening of May 12, defendant "seemed normal." Defendant came into his parents' bedroom where his mother was washing her face and asked her to get him the telephone number for the treatment center. Defendant left the room but then came back and asked to use her bathroom. She said, "Go ahead." Defendant passed behind her as she was bent over the sink and grabbed her in a tight bear hug. His mother told a police officer that defendant put her in a headlock and cut across her throat with a knife. Defendant's mother felt the knife at her neck, grabbed it, and pushed it away from her throat, cutting her hands. Defendant turned the knife and made four to five "downward stabbing motion[s] towards [his mother's] chest and neck area."

Defendant's mother screamed when the attack started; in response his father ran into the room where he saw defendant holding defendant's mother in a chokehold, with a knife to her throat. Defendant's father approached to separate them and defendant swung the knife at him, cutting his father's neck as well. Defendant's father grabbed defendant's knife hand and struggled with him, allowing defendant's mother to escape.

Defendant's brother came into the room and tried to restrain defendant while his father tried to get the knife out of his hand. Defendant was extraordinarily tense and

² The record does not disclose what the parents were considering that defendant should be treated for.

strong, but did not say anything. Defendant's mother, covered in blood, ran out into the street and screamed for help; a neighbor called 911.

Defendant's father and brother sandwiched defendant between them and pushed him out of the house. Defendant's father grabbed the knife to protect defendant's brother, cutting his own hand in the process. Defendant's father finally wrested the knife from defendant's hand and threw it into a bush. Defendant's father and brother restrained him until the police arrived.

Upon arrival, the police found defendant's father and brother holding him, all of them bloody, with generally "a large amount of blood in the area." Defendant's mother had blood all over her hands, neck, and face, and her throat was cut. Defendant's mother told the police that defendant had tried to kill her. She ultimately received stitches at a hospital to close the knife wounds on her hands and medical glue to close the cut on her throat. She has a scar on her throat from the knife wound. Defendant's father also received medical glue to close the cut on his neck.

The police interviewed defendant at the scene. Defendant said that he had no mental problems and was not taking any medication. He was articulate and appeared to understand the interviewing officer. Defendant was aware that his actions "could have killed" his mother. Defendant heard his family yelling at him to stop and knew that his mother was trying to defend herself from him.

Defendant said he had not been getting along with his parents recently and questioned whether they were really his parents because "they were not treating him right

and not helping him find a job.” Defendant said he had been trying to obtain a blood sample from his mother. He also asked the interviewing officer to check if his mother had a C-section scar on her stomach to prove that she was not his mother.

2. Defense Evidence

Defendant testified that he was “pretty sure” his mother was not actually his mother and his father was not actually his father. Defendant had noticed when he returned home that they looked different. His real mother had a nose job to make it look less Filipino. However, his mother’s voice sounded the same as it always had.

Defendant’s real father was less “anemic” and had thicker hair. Defendant’s grandfather had thick hair and defendant did not believe his real father’s hair would thin or recede. Defendant also noted that he did not see his diabetic father taking insulin shots even when he ate at a large buffet. Defendant doubted that his brother was his actual brother because of his association with his parents.

Defendant chose a serrated knife for the attack rather than a sharper knife because it allowed a more controlled cut. Defendant had training as a surgical technician and was familiar with different knives. Defendant also took a sample of hair from his mother for genetic testing during the struggle. Defendant admitted that he could have obtained genetic material for testing other ways and did not have to saw his mother’s neck to obtain blood. Instead, defendant had hoped by cutting her neck, rather than a less dangerous spot, the police would take pictures of her head which could be compared to pictures of his real mother. Defendant was aware that it was a “bizarre [] thinking

process,” but denied using alcohol or narcotics, or having a mental illness. Defendant testified that he had not been trying to kill his mother. Defendant continued struggling with his family members because he wanted to preserve the blood sample he had obtained. Defendant admitted that his course of action was “irrational, but the only rational outcome left for” him.

On cross-examination, defendant admitted that he had gotten into an argument over finances with his parents and was upset that they were not upholding their bargain to pay for his student debt. Defendant blamed his parents’ failure to cover his student debt for why he had to leave medical school. He was also upset about their lack of help in finding him a job, contrary to an agreement they had made, and generally treating him badly.

A forensic psychologist testified that defendant suffered from “Capgras” delusions in which he believed that his close family had been replaced by impostors. However, she admitted that defendant had acknowledged that while he did not believe he was wrong about his parents being impostors, “if he was wrong, then it would mean that he had basically thrown his life away and that his parents were . . . ‘just assholes.’ ”

3. Sentencing

The trial court reviewed the probation officer’s report prior to the sentencing hearing. The report listed as circumstances in mitigation: (1) defendant had no prior record; and (2) he was suffering from a mental condition that significantly reduced culpability. It listed as circumstances in aggravation: (1) the crime involved great

violence; (2) defendant used a weapon in the offense; (3) the crime indicated planning; and (4) defendant took advantage of a position of trust or confidence to commit the offense. As a result, the report recommended an aggravated upper term of nine years for the attempted murder, plus three years for the great bodily injury enhancement, for a total of 12 years.

Prior to the sentencing hearing, the trial court committed defendant to the California Department of Corrections and Rehabilitation (CDCR) for a 90-day diagnostic evaluation. (§ 1203.03.) At that time, the court indicated that it thought there were mitigating factors and the prosecutor agreed. Following the 90-day diagnostic evaluation, the CDCR submitted a report in which it recommended a prison term based on the aggravating factors from the probation report and a continued lack of remorse as reported in the psychological evaluation.

At the sentencing hearing, the court indicated that in addition to the probation report, it had also reviewed the diagnostic report. Defense counsel argued that because defendant could receive treatment on probation, and defendant's delusions were mitigating, the court should grant probation. Defendant, however, told the court directly that while he would agree to a psychiatric consultation, he was not sure he could agree to psychotropic medication. The prosecutor responded that defendant's actions were vicious and, despite his delusions, he was able to appreciate the wrongfulness of his actions and knew what he was doing when he attacked his mother. The prosecutor argued defendant was under the belief that he did not suffer from mental illness and

would not take his medication if not in custody. The prosecutor requested the middle term of six years for the attempted murder, plus three years for the great bodily injury enhancement, for a total of nine years, three years less than the probation report recommendation.

The trial court found that per the diagnostic psychiatrist's recommendation, defendant needed to be in a controlled psychiatric environment, which the prison system could provide, and denied probation. The court indicated that it was going to follow the probation report recommendation for the aggravated upper term for the attempted murder. Defense counsel argued in mitigation that the court should follow its original indication because defendant had no prior criminal record or record of violence and because he would never have formed the intent to murder except for the mental illness. Defense counsel urged the court not to double count the great bodily injury enhancement. The prosecutor responded that while the delusion may have caused him to believe that his parents were impostors, he still planned the murder because he was unhappy with their behavior toward him. The prosecutor argued that defendant was a danger to his parents and the community.

The trial court sentenced defendant to the upper term for the attempted murder after finding: (1) that the crime was one of violence, cruelty, and viciousness; (2) that it was done with planning; and (3) that he did it from a position of trust. The court recognized that defendant had no prior record and had a mental condition, but defendant understood that what he was doing was "highly dangerous and would likely result in

death.” The court explicitly stated that it was not double-counting the jury’s great bodily injury finding and that it was not using it as a factor in aggravation.

II

DISCUSSION

Defendant contends the trial court abused its discretion when it sentenced him to the upper term of nine years for the attempted murder. We disagree.

A trial court’s sentencing decision is subject to review for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) “The trial court’s sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an ‘individualized consideration of the offense, the offender, and the public interest.’ ” (*Ibid.*) A trial court abuses its discretion “if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision.” (*Ibid.*) A single aggravating factor will suffice to justify a trial court’s discretionary selection of an upper term. (*People v. Steele* (2000) 83 Cal.App.4th 212, 226.) However, the court cannot impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law, unless the court can and does strike the punishment for the enhancement. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(c).) Thus, if the trial court properly found a single aggravating factor, it did not abuse its discretion in sentencing defendant to the upper term for the attempted murder.

As a threshold matter, the People argue that defendant has forfeited his claims on appeal related to the trial court's use of aggravating factors in sentencing because he failed to object to each aggravating factor at sentencing citing to *People v. Scott* (1994) 9 Cal.4th 331, 356. However, because defense counsel did argue that the mitigating factors should outweigh the aggravating factors, we will address defendant's claims as to the use and balancing of factors on the merits. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1183, fn. 5 [where preservation of issue is "close and difficult," it is assumed the right to appeal has been preserved]; see *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [appellate court has discretion to reach unpreserved issues].)

Here, the court considered the probation and diagnostic reports and heard arguments from defense counsel and the prosecutor before imposing the upper term. Thus, the decision was neither arbitrary nor capricious. Instead, the court followed the recommendation of the probation report and found three factors in aggravation: (1) that defendant's crime was one of violence, cruelty, and viciousness (Cal. Rules of Court, rule 4.421(a)(1)); (2) that defendant committed the crime with planning (rule 4.421(a)(8)); and (3) that defendant took advantage of a position of trust (rule 4.421(a)(11)). The court recognized in mitigation that defendant had no prior record (rule 4.423(b)(1)) and had a mental condition (rule 4.423(b)(2)), but found that the aggravating factors outweighed the mitigating factors.

The record amply supports all three aggravating factors. (1) As to viciousness, defendant not only sawed his mother's neck with a serrated knife, but when she fended

off his initial attack, he responded by turning the knife and repeatedly trying to stab her.

(2) As to planning, defendant admitted at trial that he planned ahead and used a serrated knife because it would produce a more controlled cut and enable him to get the blood sample he testified that he wanted. Defendant chose the neck in the hope that the police would take photographs of her head that could be used to compare to pictures of his real mother. Similarly, it can be inferred that defendant planned ahead when he asked her permission to use the bathroom in her room, claiming that the other one was occupied. The excuse for being in her room presumably lulled his mother into a sense of safety before the attack. (3) As to using a position of trust, defendant was her son, and she trusted him to walk through her bedroom while she was vulnerable to attack.

As any one of these aggravating factors alone would have been sufficient for the court to use its discretion in imposing the upper term (*People v. Steele, supra*, 83 Cal.App.4th at p. 226), the trial court did not abuse its discretion in sentencing defendant to the upper term.

Defendant argues that the trial court should not have changed its initial indication that it would not impose the aggravated term after receiving the diagnostic report which “provided the court with no new information.” Although defendant cites no case law supporting an argument that trial courts are not permitted to reevaluate earlier sentencing indications, the diagnostic study did provide the court with new information indicating that defendant continued to show no remorse for his crimes and that he required a “controlled psychiatric environment” which probation could not provide. Additionally,

defendant showed a new reluctance to take psychotropic medications that he had not previously expressed. Thus, even assuming legal merit to such a claim, the trial court had good reason to reevaluate its earlier sentence indication.

Defendant argues that because there is a statutory prohibition on using a fact charged and proved as a sentence enhancement to impose an upper term (§ 1170, subd. (b)), the trial court was prohibited from using cruelty and viciousness once the jury already found a great bodily injury enhancement. Defendant cites *People v. Gutierrez* (1992) 10 Cal.App.4th 1729 to support this argument. However, the *Gutierrez* court explicitly found that the lower court in that case improperly used the single factor of great bodily injury to impose both an enhancement and the upper term, not the two separate factors of (1) great bodily injury and (2) cruelty and viciousness of the crime, as in this case. (*Id.* at 1735.) Indeed, cruelty and viciousness can be used to aggravate a sentence even where great bodily injury was already used as a sentence enhancement as they are different factors. (*People v. Duran* (1982) 130 Cal.App.3d 987, 990-991; *People v. Hawk* (1979) 91 Cal.App.3d 938, 940-941.)

Defendant argues that all attempted murder is cruel and vicious and that cannot be an aggravating factor for attempted murder because it is an element of the crime. However, that is simply not true. Cruelty and viciousness is not an element of attempted murder and may certainly be used as an aggravating factor. (§ 187; CALCRIM No. 600; *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1302-1303; *People v. Gutierrez, supra*, 10 Cal.App.4th at pp. 1735-1736.)

Defendant argues that the court impermissibly relied on the great bodily injury itself as an aggravating factor. However, the trial court could not have been clearer when it said, “If you listen carefully when I was talking about the facts in aggravation, I did not use the great bodily harm as a fact in aggravation.” Accordingly, the trial court did not abuse its discretion in sentencing defendant to the upper term of nine years for the attempted murder.

Finally, defendant argues that there was no evidence to support the trial court’s conclusion that defendant “needs all the time that we can give him within a controlled psychiatric setting” and that the trial court improperly relied on that conclusion in sentencing him. However, because defendant did not object on this basis at sentencing, we agree with the People’s argument that this issue has been forfeited on appeal. (*People v. Scott, supra*, 9 Cal.4th at p. 356.)

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

McKINSTER

J.

SLOUGH

J.